



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

EPA Region 5 Records Ctr.



330480

REPLY TO THE ATTENTION OF:

May 31, 2005

C-14J

VIA FACSIMILE AND POUCH MAIL

Eurika Durr
U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, DC 20005

RE: Petition Number: CERCLA 106(b) 04-01
 Grand Pier Center, LLC, Chicago IL

Dear Ms. Durr:

With this letter, I am enclosing an original and five copies of Respondent's Motion For Leave to File Instant Supplemental Brief. The Instant Supplemental Brief is attached to the motion. Thank you for your assistance.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Mary L. Fulghum".

Mary L. Fulghum
Associate Regional Counsel

Enclosures

cc: Frederick Mueller w/encl.

bcc (w/encl):

Cathleen Martwick
Erik Swenson
Maria Cintron-Silva
Earl Salo
Lee Tyner
Annette Lang

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:

Grand Pier Center, LLC

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CERCLA 106(b) Petition No. 04-01

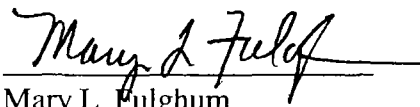
**RESPONDENT'S MOTION FOR LEAVE TO FILE
AN INSTANTER SUPPLEMENTAL BRIEF**

Respondent, United States Environmental Protection Agency, Region 5, requests for the foregoing reasons, that the Board grant leave to file an Instanter Supplemental Brief. While preparing for oral argument, Respondent realized that an important legal theory that many courts have considered as the basis for determining that a person who was not a title owner to real property was nonetheless liable as an "owner" under CERCLA 107(a) had been overlooked by the Respondent and Petitioner. U.S. EPA Region 5 recognizes that this may be considered an extraordinary request as it comes only three weeks before the date of the oral argument. However, given its relevance and importance, Respondent believes it is important that the Board be aware of the theory and caselaw as that knowledge may assist the Board in its consideration of the matter.

Respondent brings this motion for leave to file a Instanter Supplemental Brief in good faith and does not seek to delay the EAB's consideration of the Petition for Reimbursement.

Respondent has provided Petitioner with a copy of this motion and Counsel for Petitioner has no objection to this motion provided Petitioner may file a five-page Supplemental Reply Brief by June 8, 2005 via facsimile and U.S. mail.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Mary L. Fulghum", written over a horizontal line.

Mary L. Fulghum
Cathleen R. Martwick
Associate Regional Counsels
U.S.EPA, Region 5
77 W. Jackson
Chicago, Illinois 60604

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:

Grand Pier Center, LLC

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CERCLA 106(b) Petition No. 04-01

RESPONDENT'S INSTANTER SUPPLEMENTAL BRIEF

Several courts have interpreted CERCLA's Section 107(a) ownership liability as applicable to persons who did not hold fee title to the property within a facility. For the purposes of CERCLA Section 107(a), those persons who have requisite indicia of ownership vis a vis the record owners are de facto owners and therefore strictly liable. Petitioner's own construction contractor's daily field reports, plans, drawings, and progress photographs demonstrate the extent to which Grand Pier obtained and exercised dominion and control over the Columbus Drive sidewalk right-of-way. Grand Pier obtained permits to block access to the adjacent Columbus Drive lane and sidewalk right-of-way, to excavate and fill and install permanent encroachments within the sidewalk right-of-way. As an example, along caisson column 25, which ran parallel and adjacent to the Columbus Drive sidewalk, before conducting any radiation surveillance, Grand Pier conducted "pot holing" and installed caisson C-25.¹ Drawings show caisson C-25

¹Respondent's Attachment 30, Attachment 1, Morse Diesel Daily Field Reports, Jan. 28, 31, Feb. 1, and Feb. 29, 2000.

encroaching into the contaminated sidewalk right-of-way.² Furthermore, Grand Pier's work plan explains that as part of the building construction "[e]xcavations will also be required at the top of each caisson for construction of a cap."³ The excavation for the caisson caps apparently required an approximately 8-foot square perimeter.⁴ Given the placement of the caisson in relation to the property line, any caisson cap excavation would extend into the contaminated right-of-way.⁵ In addition to the caisson cap excavation in the contaminated sidewalk right-of-way, Grand Pier excavated the entire length of the contaminated sidewalk right-of-way to accommodate construction of grade beams.⁶ Grand Pier controlled the sidewalk right-of-way which enabled Grand Pier to conduct actions necessary to support the development of the portion of the facility to which Grand Pier held title.⁷ The permits that Grand Pier obtained to conduct these extensive activities in the right-of-way ceded significant control over the property to Grand Pier, albeit for a short term. Although, like a lessee, Grand Pier did not have the right to transfer the right-of-

²Respondent's Attachment 11, STS Work Plan for Site Radiation Survey and Excavation Soil Management (Mar. 20, 2000) at Fig. 2B, Caisson Plan - Area C.

³Respondent's Attachment 11, STS Work Plan for Site Radiation Survey and Excavation Soil Management (Mar. 20, 2000) at page 6, section 2.6.

⁴Respondent's Attachment 11, STS Work Plan for Site Radiation Survey and Excavation Soil Management (Mar. 20, 2000) at page 8, section 2.8.

⁵Respondent's Attachment 11, STS Work Plan for Site Radiation Survey and Excavation Soil Management (Mar. 20, 2000) at Fig. 2B, Caisson Plan - Area C, especially caisson column line 25 adjacent to property line.

⁶Respondent's Attachment 36, Addendum to May 26, 2000 Correspondence, Fig. 1.

⁷Respondent's Response to Petition for Reimbursement also contains a detailed discussion of the right-of-way activities and encroachments at Section B. 4., Subsections ii and iii, pages 12 -16.

way property, the degree of control that Grand Pier exerted over the sidewalk right-of-way, as evidenced by the extent of excavation and the placement of permanent encroachments in the sidewalk right-of-way, was significant to Grand Pier's CERCLA liability. Grand Pier is liable as an "owner" of the sidewalk right-of-way under CERCLA Section 107(a), because Grand Pier barricaded, controlled, excavated, and installed permanent encroachments in the right-of-way, thereby demonstrating that it possessed the requisite indicia of ownership for the purpose of establishing CERCLA owner liability.

In U.S. v. South Carolina Recycling & Disposal, Inc., the property owners and lessor entered into an oral lease, 653 F.Supp. 984, 1002-3 (D. S.C. 1984) aff'd in part, vacated in part sub nom. United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988) (lessee did not appeal the district court judgment with respect to ownership liability, therefore it was not discussed), cert. denied, 490 U.S. 1106, 104 L. Ed. 2d 1019, 109 S. Ct. 3156 (1989) (SCRDI). The U.S. District Court for South Carolina analyzed who controlled the site and concluded that the lessee was a facility owner under CERCLA. The court also noted that in the definitional provisions of CERCLA "site control" is an important consideration in determining who qualifies as an owner under Section 107(a). The court held that "site lessees ..., should along with the property owners themselves, be considered owners for the purposes of imposing liability under Section 107(a). To conclude otherwise would frustrate Congress' intent ..." Id. at 1003. The SCRDI court astutely observed that, in CERCLA, control over activities of the facility is an important factor in determining who qualifies as an owner.

The Northern District of Illinois in Pape v. Great Lakes Chem. Co., followed the SCRDI site control analysis. 1993 U.S. Dist. LEXIS 14674, No. 93 C 1585 at *8-9, 1993 WL 424249, at

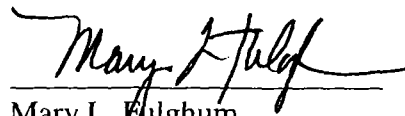
*3 (N.D. Ill. Oct. 19, 1993). The court explained that “[a]lthough ... lessors, *might* be considered the owners of the land in the traditional sense, the lessee of a site where a release or threatened release of hazardous substances occurred *is* considered an “owner” for purposes of CERCLA liability. Id. (emphasis added).

While most district courts that have examined lessee liability have concluded that site control may be the defining indicator of CERCLA ownership, the role of the site control analysis appears less settled among the circuit courts. In United States v. Mexico Feed & Seed Co., 980 F.2d 478, 484 (8th Cir. 1992), the Eighth Circuit held that a lessee waste oil service company was a “responsible party” for CERCLA purposes. However, the Second Circuit has complained that the site control approach may blur the line between owners and operators and declined to hold a lessee liable as an owner. See Commander Oil Crop. v. Barlo Equipment Corp., 215 F.3d 321, 328 (2nd Cir. 2000). The Second Circuit acknowledged that lessees may be liable as owners but declined imposing 107(a) ownership strict liability when the site control was the sole basis for liability. The court was reluctant to surprise all lessees that they had the duty equivalent to that of an owner to exercise due care with respect to hazardous substances present at their leased property and to take precautions against foreseeable consequences or face strict liability. As the owner of the adjoining property, no such surprise would ambush Grand Pier, and therefore Commander Oil should not be applied. Grand Pier was already subject to the due care and precautionary duties, and there is no reason to share the Second Circuit’s concern that as the lessee of certain property interests in the right-of-way, Grand Pier would suddenly be surprised by the required standard of care.

The site control analysis is not the sole basis for Grand Pier's liability. This Board recognized in In Re Town of Marblehead, 10 E.A.D. 570, 596 (EAB 2002) that where historical operations in and adjacent to a right-of-way resulted in contamination of the entire right-of-way, the owner of a portion of the right-of-way was liable for the cleanup costs associated with the entire right-of-way. See also United States v. Atchison, Topeka & Santa Fe Ry., 2003 U.S. Dist. LEXIS 23130 (D. Cal., 2003) (holding the EPA need not prove that an owner owns an entire facility to establish liability under Section 107 of CERCLA) citing U.S. v. Rohm and Haas Co., 2 F.3d 1265, 1268 (3rd Cir. 1993).

The foregoing arguments further demonstrate that although Petitioner does not enjoy fee title to the sidewalk right-of-way surrounding its property, Grand Pier's temporary rights to barricade, control, and excavate the right-of-way coupled with its permanent right to place caissons in the right-of-way, subject Petitioner to CERCLA Section 107(a) "ownership of a facility" liability with respect to the off-site radioactive contamination present in Columbus Drive sidewalk right-of-way.

Respectfully submitted,



Mary L. Fulghum
Cathleen R. Martwick
Associate Regional Counsels
U.S.EPA, Region 5
77 W. Jackson Blvd.
Chicago, Illinois 60604

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

Certificate of Service

I certify that ***RESPONDENT'S MOTION FOR LEAVE TO FILE RESPONDENT'S INSTANTER SUPPLEMENTAL BRIEF (SUPPLEMENTAL BRIEF IS ATTACHED TO MOTION)*** was filed in the following manner on the following date:

Original and five copies to:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC. 20460-0001
(202) 233-0121
[via facsimile and pouch mail]

Mr. Frederick Mueller
Johnson and Bell, LTD.
55 East Monroe/Suite 4100
Chicago, Illinois 60603
(312) 373-0770
(312) 372-9818 facsimile
[via facsimile and regular mail]

5/31/05
Date

Mary L. Foley